

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1335-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JAMES R. GRIFFIN,
and KATHERINE GRIFFIN,**

Plaintiffs-Appellants,

v.

**V & J FOODS, INC. a/k/a
V & I FOODS, INC.,
COMPCARE HEALTH SERVICES
INSURANCE CORPORATION,
and CONTINENTAL WESTERN
INSURANCE COMPANY,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. In the early morning hours of September 20, 1990, James R. Griffin was waiting to place an order in the "drive-thru" lane of a Burger King when he was shot by a person attempting to rob him. Griffin sued V & J Foods (hereafter "Burger King"), the owner of the Burger King, claiming that it failed to exercise ordinary care to protect him while he was on the Burger King premises. After a trial to the court, the circuit court held that Burger King had been negligent, but not causally so. Griffin appeals. Pursuant to this court's order dated June 21, 1995, this case was submitted to the court on the expedited appeals calendar. We affirm.

The relevant facts are largely undisputed. The Burger King was located in a high-crime area of Milwaukee. It was 3:00 a.m. when Griffin was waiting in the drive-thru lane. The dining room was closed at that hour for security reasons. Two cars ahead of Griffin were waiting to place orders and, as a result, Griffin was behind the building, out of sight of any Burger King employees.

Griffin testified that as he waited, he noticed two black males "standing in the middle of the parking lot." He stated that he "assumed that they were waiting for somebody." When one of the cars ahead of him pulled forward, Griffin pulled forward. He then realized that only one of the black males remained in the parking lot, and he turned his head "to see where the other guy was." As he turned his head, the "other guy," subsequently identified as Anthony Hoskins, stuck a gun through the open car window and told Griffin to "give it up." At Hoskins' criminal trial, Griffin testified that it was "only a matter of seconds" from the time he first saw Hoskins in the parking lot, and the time the gun was pointed at him.

Griffin testified that he told Hoskins that he would give him nothing, and that he then attempted to "block the gun" by raising his left arm. He also attempted to escape by placing his car in reverse. The car slipped into park, however. Hoskins' gun discharged, and Griffin was struck in the left arm and seriously injured. Hoskins fled.

Griffin drove his car to the drive-thru speaker and told the employees that he had been shot. The Burger King manager called the police.

The police arrived at the scene of the shooting seventeen minutes after the emergency call was placed.

Lynell Perry, a Burger King employee, was working at the drive-thru window at the time of the shooting. She testified that shortly before the attempted robbery, Hoskins had walked up to the drive-thru window to place an order. Perry stated that she knew Hoskins, and that she had not had any previous trouble with him. She testified that she did not believe Hoskins was a threat to the patrons or employees, and that Hoskins did not show a weapon to her or threaten anyone. She testified that she told Hoskins that she was forbidden from serving "walk-ups." Perry testified that she observed Hoskins approach some of the automobiles in the drive-thru line, apparently in an attempt to have someone purchase food for him. Perry testified that she then told Hoskins that he would not be allowed to purchase food from the drive-thru window, and that he should leave the premises. She testified that Hoskins then walked to the back of the building. Within one or two minutes, Perry heard the gunshot.

Kenneth Grover, a restaurant security expert, testified that Burger King was negligent in its security arrangements. Grover noted that the Burger King was located in a high-crime area, and that in the four months prior to the attempted robbery of Griffin, there had been two other robberies in the drive-thru lane. Grover testified that Burger King was negligent for failing to ensure that it could observe its entire premises. He testified that he believed Burger King's negligent security arrangements were a proximate cause of Griffin's injury because they permitted Hoskins to loiter on the premises unobserved, and failed to ensure proper monitoring of the area where Griffin was shot.

The trial court held that Burger King was negligent. It noted that the Burger King was being operated in a high-crime area, and that robberies were therefore foreseeable by the owner. It noted that Burger King had taken some precautions to prevent robberies, such as closing the dining room after 10:00 p.m. It noted that Burger King could have taken additional safety precautions. Specifically, the trial court noted that Burger King could have installed devices that would have allowed employees to monitor the drive-thru lane, or it could have employed a security guard.

The trial court found, however, that Burger King's negligence had not caused Griffin's injuries. It rejected Griffin's contention that the Burger King staff was negligent in failing to call the police shortly after Hoskins approached the drive-thru window. The court reasoned that, at that time, Hoskins was not threatening people or brandishing a weapon. It held that Hoskins' behavior at that time was not conduct "that would cause a reasonable person, a reasonable business proprietor under those circumstances, to immediately call the police." The court noted that, even if Burger King had called police due to Hoskins' behavior at that time, police would have likely ignored the call, given Hoskins' then non-threatening behavior.

The trial court also held that Burger King's negligence was not causal because Hoskins' assault occurred quickly and without any apparent warning. The court noted that even if Burger King had installed security devices that allowed employees to view the drive-thru lane, those devices would not have prevented Hoskins' actions. The trial court stated, "[V]iewing doesn't stop people from doing something." In addition, the trial court noted that it had taken police seventeen minutes to arrive after the Burger King manager placed the emergency call. It stated that "even if the restaurant was negligent for not calling the police, it absolutely was not causal to Mr. Griffin's injuries because the police would never have gotten there in time to do anything to deter or stop" the shooting. The trial court concluded that Griffin had failed to show that, under the facts and circumstances of this case, the presence of additional security measures, or an immediate call to the police would have deterred or prevented the shooting.

On appeal, Griffin contends that, given the evidence adduced at trial, the trial court had no option but to find that Burger King's negligence was causal. Griffin states: "[T]he causal nexus is clear and irrefutable." We disagree.

A trial court's factual findings will not be disturbed on appeal unless they are clearly erroneous. *See* § 805.17(2), STATS. This standard is essentially the same as the "great weight and clear preponderance" test, and we sometimes refer to that test for an explanation of the "clearly-erroneous" standard. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Under the "great weight and clear preponderance" test:

The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence.

Cogswell v. Robertshaw Controls Co., 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Id.* at 250, 274 N.W.2d at 650.

Here, the trial court used *Weihert v. Piccione*, 273 Wis. 448, 78 N.W.2d 757 (1956), as the framework for analyzing the evidence presented. We agree that *Weihert* is instructive. In that case, a restaurant patron was assaulted suddenly and without any warning by another patron. The assaulted patron sued the restaurant. When no evidence was produced at trial to show that any one, including the patrons or the restaurant staff, anticipated the assault, the trial court concluded that the plaintiff had failed to establish causal negligence on the part of the restaurant. *Id.* at 457-58, 78 N.W.2d at 762.

The supreme court upheld the trial court's determination, reasoning that a restaurateur has a duty to use ordinary care to protect patrons from harm caused by others on the premises "if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected" the patrons by controlling the actions of the others or by giving a warning to the patrons that would have enabled them to avoid harm. *Id.* at 455-56, 78 N.W.2d at 761. The supreme court noted, however, that the trial court had determined the assault "occurred instantly and without warning." It also noted that neither the restaurateur or his employees "had notice or knowledge" that the person who committed the assault possessed "violent propensities."

A similar analysis of the evidence adduced in the instant case supports the determination that Burger King's negligence was not causal. First,

Hoskins was known to Perry, the employee at the drive-thru window. She testified that she had never had trouble with Hoskins in the past. Perry told Hoskins that she could not serve him, and, after he was told to leave the cars in the drive-thru lane alone, he apparently left the premises. There was no evidence produced to show that the Burger King staff had notice or knowledge of Hoskins' "violent propensities."

Second, the trial court's finding that Hoskins' attack on Griffin occurred so suddenly that it could not have been prevented by additional security measures is supported by the evidence. The trial court noted that Hoskins' initial approach to the drive-thru window had not been threatening, and concluded that Burger King's failure to call police at that time was not negligent. It further noted that, even if Burger King had installed additional security devices that would have allowed them to view the rear of the building where the assault took place, the assault occurred so suddenly that those security measures would have made no difference. Griffin himself had admitted that only "seconds" elapsed from the time he first saw Hoskins to the time Hoskins pointed a gun at him. In addition, the evidence showed that even if Burger King had summoned the police prior to the attempted robbery, the crime occurred so soon after Hoskins left the drive-thru window that the police could not or would not have responded prior to the robbery.

Because Griffin was unable to establish that additional security measures or an earlier call to the police would have prevented the attempted robbery, we are satisfied that the trial court's determination that Burger King's negligence was not causal in this case is supported by the great weight and clear preponderance of the evidence.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.